No. 90-484

IN THE

Supreme Court of the United States

October Term, 1990

BILL TABER, D/B/A
TABER'S GRASS FARM
Petitioner
v.
JAMES C. PLEDGER, DIRECTOR,
ARKANSAS DEPARTMENT OF
FINANCE AND ADMINISTRATION
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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PETITIONER'S REPLY BRIEF

The Petitioner will address separately below the points raised by Respondent Pledger in his Brief in Opposition. The Petitioner will also specifically address the real conflict that now exists between the rationale of the Arkansas Supreme Court's decision in this *Taber* case and that set forth by the Iowa Supreme Court in that court's recent decision in the case of *Schroeder Oil Co. v. Dept. of Rev. & Finance*, 458 N.W.2d 602 (Ia. 1990). The Iowa Supreme Court held, in its *Schroeder Oil* case, that a taxpayer's "federal" Fourteenth Amendment rights to due process were denied to the protesting taxpayer in

that case, because there was a total lack of post-deprivation review available to the taxpayer to contest the state excise tax assessment under Iowa's tax procedure statutes.

1. This Court's recent decision in *McKesson* held that "federal" due process standards require that the states provide either a pre-deprivation hearing or a post-deprivation hearing to the contesting taxpayer. These hearings on the disputed tax assessments must be "judicial reviews," not state tax "administrative reviews."

The Respondent's *only* real argument in opposition to the Petitioner's Petition for Certiorari is that the Petitioner has been afforded a pre-deprivation hearing on the merits, and that he is therefore not also entitled to a post-deprivation hearing on the merits. (Resp. Br. 3-5). The Petitioner submits that the Respondent clearly misrepresents or misinterprets what this Court held was required of states to meet "federal" due process standards in *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 485 U.S. —, 110 S.Ct. 2238 (1990). There, this Court clearly indicated that any pre-deprivation hearing must be a "judicial hearing," as opposed to an "administrative hearing." Therefore, the in-house "administrative review" provided to the Petitioner by the Respondent's agents, under the provisions of the Arkansas Tax Procedure Act (ATPA) (Ark. Code Ann. §26-18-404 and 405) falls woefully short of meeting this Court's mandate that the states must provide taxpayers with a fair

opportunity for a "judicial hearing" within which to contest the validity and legality of the assessed state tax. Mr. Taber has been totally denied his rights to "federal" due process by the State of Arkansas in this contested Sales Tax assessment.

a. A judicial review of a disputed tax assessment is required for a state to meet the "federally" guaranteed rights of due process of the laws.

In *McKesson*, 110 S.Ct. at 2250, this Court held that the states must provide either a pre-deprivation hearing or a post-deprivation hearing to give the protesting taxpayer "a fair opportunity to challenge the accuracy and legal validity of the tax obligation." This Court clearly stated (with regard to the pre-deprivation alternative) that:

> Because the exaction of a tax constitutes deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the requirements of the due process clause. The State may choose to provide a form of 'pre-deprivation process,' for example, *by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment,* or *by allowing payers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State.* [Emphasis

Supplied]{1}

The "preassessment" or pre-deprivation" administrative review granted to Arkansas taxpayers by the provisions of Ark. Code Ann. §§26-18-404 and 405, though providing taxpayers with some rudimentary procedural due process, it is *not* the type of procedural due process guaranteed to a taxpayer by the Fourteenth Amendment. This "federally" guaranteed right to due process means that the taxpayer is entitled to a "judicial review" of his dispute with the tax administrator, especially in a post-deprivation setting where the tax is contested by the taxpayer.[2] This Court's admonition that taxpayers must be provided a " fair opportunity to challenge the accuracy and legal validity" of the tax assessment, can only be satisfied by a "judicial review" of the actions of the personnel of the Executive Branch; in light of the tax statute adopted by the Legislative Branch; with both other branch's actions being governed by the parameters of

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[1] The Petitioner submits that this Court clearly indicated in this passage from the McKesson decision that the required "pre-deprivation" hearing process involve either (1) a suit for injunction or declaratory judgment, or (2) a contest in a collection suit by the state. Ark. Code Ann. §26-18-406(d) specifically prohibits a taxpayer from seeking injunctive or declaratory relief in the Arkansas courts. Here, though the Respondent could have initiated a collection suit against Taber, he chose, instead, to use summary methods of collection through levy and distraint processes provided by Ark. Code Ann. §26-18-701. (Petitioner's Pet., App. C, 13a).

[2] The Petitioner has never stopped protesting the assessment in question. Therefore, he has not voluntarily allowed his procedural rights to lapse, notwithstanding any implication to the contrary by the Respondent. (Resp. Br. 4-5).

the U.S. Constitution.[3]

b. The pre-deprivation review afforded the taxpayer by the Arkansas Tax Procedure Act was an administrative review, not a judicial review, and therefore it clearly cannot be "deemed" to have met the "federal" due process requirements.

In his brief in opposition, the Respondent's counsel artfully attempts to clothe the pre-deprivation "administrative hearing" afforded taxpayers under the terms of the ATPA with judicial trappings by using terms such as "a trial on the merits" (Resp. Br. 2); the hearing was in "an Administrative Law Court" (Resp. Br. 1); or the Administrative Law Judge renders his decision in writing with "findings of fact and conclusions of law based upon the evidence presented at trial." (Resp. Br. 4). However, the plain and unvarnished truth is that the pre-deprivation review procedure afforded a contesting Arkansas taxpayer (under the provisions of Ark. Code Ann. §§26-18-404 and 405) is *strictly* an "administrative review" (manned by a member of the Executive Branch of Arkansas' state government). These personnel answer to the ultimate administrator (the Respondent) of the

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[3] See Marbury v. Madison, 1 Cranch 137, 177, 2L.Ed.2d 60 (1803); Baker v. Carr, 369 U.S. 186 at 217 (1962); Powell v. McCormack, 395 U.S. 486, 521 (1969); Nixon v. Administrator of General Services, 433 U.S. 425, 503 (1977); and Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 61-62 (1902).

challenged Sales Taxes;[4] the Arkansas Rules of Evidence are *not* applicable in these hearings; and the hearings are, by their nature, very similar to an informal Appellate Division conference with an IRS representative, under the similar federal tax procedure scheme.

A meaningful type of "pre-deprivation review" that could be afforded a protesting taxpayer would be one where an appeal could be taken by the taxpayer, from the tax administrator's adverse administrative decision, directly into the state court system without the necessity of making payment of the disputed assessment.[5] Such a "pre-deprivation review" would be afforded under Arkansas' general Administrative Procedure Act (Ark. Code Ann. §25-15-212), but the provisions of the ATPA (§26-18-405) specifically exclude tax controversies from being subjected to the provisions or requirements of the Arkansas Administrative Procedures Act.

Finally, in a refund action by a similarly situated Arkansas sod farmer-taxpayer, Coy Mac Boyd (who was financially able to afford to "make full payment" of

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[4] The administrative review is performed by the tax administrators within the Executive Branch of Arkansas' state government, and the final appeal provided by §26-18-405(d)(4) is to the Commissioner of Revenues. In fact, that option was exercised by Taber and denied by the Respondent in this case. The Respondent, in his letter denying the requested revision in the taxpayer's favor, notified Taber that the taxpayer had "exhausted his administrative remedies."

[5] A system similar to the U.S. Tax Court tax procedure in the federal tax procedures system.

the entire amount of Sales Taxes assessed by the Respondent), secured an objective and independent "judicial review" of his claim that his sales of sod qualified for the exemption for the sale of "raw farm products," where the chancellor in the trial found against the Respondent, and, in effect, against the Respondent's Hearing Officer who had previously rendered adverse "administrative decisions" against both Taber and Boyd at this "administrative review" level.[6]

c. Arkansas' Tax Procedure Act provides *only* a post-deprivation basis for judicial review of the Respondent's actions in assessing state taxes.

There are only two ways that a taxpayer contesting an Arkansas state tax may secure a "judicial review" of his dispute with the Respondent under the ATPA. Both of these statutory causes of action, the "protest provision" (§26-18-406) and the "claim for refund"

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[6] See the decision of the Honorable Ralph E. Wilson, Jr., in the case of Coy Mac Boyd, d/b/a Turf Plantation v. Ragland, Commissioner of Revenues, Craighead County Chancery Court Docket No. 89-1153 (Pet. App. D, p. 22a). This case is now pending appeal before the Arkansas Supreme Court in an action styled Pledger v. Boyd, Arkansas Sup. Ct. Docket No. 90-236. However, even if Coy Mac Boyd is successful in defending his right to claim the exemption for the sale of "raw farm products," and the Respondent decides to apply that decision both retroactively and prospectively to all taxpayers (including Taber), such administrative action will not moot the taxpayer's claim of a denial of the "federal" due process of law guaranteed to him by the Fourteenth Amendment, because this procedural defect will remain as long as the Arkansas Supreme Court's decision in Taber v. Pledger remains as the controlling law for the State of Arkansas.

provision (§26-18-507), are available *only* after the disputed tax has been paid. In fact, the decision of the Administrative Hearing Officer in this case is not even binding upon the Respondent, since §26-18-406(b)(1) provides that the entire matter "shall be tried *de novo*" in the Chancery Court.

To rectify the State of Arkansas' denial of Taber's "federal" due process rights under the rationale of this Court's *McKesson* decision,[7] this Court does *not* have to strike down the provisions of either Ark. Code Ann. §§26-18-406 or 507 as being *unconstitutional.* Instead, all this Court has to do is provide that the "divisible tax rule" and the "partial payment exception" to the "full payment rule" (for contesting federal excise taxes under the Fifth Amendment) applies equally under the Fourteenth Amendment to challenges by taxpayers to state excise taxes. Thus, by requiring state courts to follow this Court's mandate on this issue, as set out in *Flora v. United States*, 362 U.S. 145 (1960), the constitutional dilemma can be solved and the "federal" due process rights under either the Fifth or Fourteenth Amendment for all taxpayers contesting excise taxes (whether of a federal or state nature) will be the same.

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[7] A copy of this Court's decision in McKesson was provided to the members of the Arkansas Supreme Court shortly before the oral argument was held in this case in early June of 1990. From a reading of the opinion rendered in the court below, it is obvious that the Arkansas Supreme Court did not recognize or adhere to this Court's reading of the "federal" due process rights guaranteed to Taber under the Fourteenth Amendment.

2. The Iowa Supreme Court, in a post-*McKesson* decision, has rendered a ruling in direct conflict, for federal due process purposes, with the decision of the Arkansas Supreme Court in this *Taber* case.

The Respondent argues (Resp. Br. 5-8) that the State of Iowa's taxing procedures are so different from those provided by the ATPA that the post *McKesson* decision of the Iowa Supreme Court in the case of *Schroeder Oil Co. v. Iowa State Department of Revenues and Finance*, 458 N.W.2d 602 (July 18, 1990), should not be considered as conflicting with the Arkansas Supreme Court's decision in this *Taber* case. Even a cursory examination of the Iowa Supreme Court's decision in *Schroeder Oil* will be sufficient to negate and reject the Respondent's arguments in this regard.

Specifically, the Iowa Supreme Court in *Schroeder Oil* found that there was absolutely no "federal" due process requirement that a taxpayer be given a pre-deprivation review of the contested tax. However, the Iowa Supreme Court correctly held that the Fourteenth Amendment requires that the contesting taxpayer be entitled to a post-deprivation hearing. The Iowa court also held that the requirement for (1) "full payment," or (2) the posting of a bond, denied the taxpayer in that case his "federal" due process rights. The factual situation in the *Schroeder Oil* case is virtually on all fours with that presented in this *Taber* case. Therefore, the Petitioner submits that there is now an additional reason for grant-

ing his Petition for Certiorari, under the provisions of Rule 10.1(b) of the Rules of this Court, i.e., there is a conflict between the courts of last resort in Arkansas and Iowa over this "federal" question.[8]

CONCLUSION

For the reasons set forth above, the Petitioner submits that his Petition for Certiorari to the Arkansas Supreme Court should be granted, so that this Court may settle a real conflict that presently exists between the highest appellate courts of Arkansas and at least one other state (and certain decisions of this Court) regarding this important "federal" constitutional question of state tax procedure.

October 31, 1990.

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8. Besides the prior decisions of this Court that the Petitioner cited in his Petition as being in conflict with the Arkansas Supreme Court's decision in the instant case, Petitioner also cites to this Court's decisions in Laing v. United States, 423 U.S. 161 (1976), and Commissioner v. Shapiro, 424 U.S. 614 (1976), as further authority for the position that his "federal" due process rights entitle him to an objective and independent "judicial review" of this dispute with the Respondent and his agents.